Supreme Court, U.S.
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No. 98-1911

IN THE

Supreme Court of the United States

WALTER S. RODRIGUEZ and ALPHONSE J. MARANTO,

Petitioners,

v.

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Does the Applicants' Petition for a Writ of Certiorari lack jurisdictional and procedural requisites for this Court's review?

II.

Was the Louisiana statute, La. R.S. 48:455, as effective between 1988 and 1992, which provided for interest to be paid on an award of excess compensation in an expropriation proceeding from the date legal demand is made by the landowner for same, violative of the Fifth Amendment to the United States Constitution?

III.

Did the "Louisiana statutory framework" for compensation for the taking of property between 1988 and 1992 violate the Fifth Amendment to the United States Constitution?

IV.

Does The State Of Louisiana Have Authority Pursuant To The Tenth Amendment To The United States Constitution To Define When Certain Substantive Rights Accrue Pursuant To Title 48 Of The Louisiana Revised Statutes?

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STATEMENT OF THE CASE

On November 18, 1988, the State of Louisiana, Department of Transportation and Development (the "State") deposited funds into the registry of the St. Charles Parish Court in accordance with a Court order, thereby permitting the State immediately to take title to certain property needed in connection with the I-310 interchange project at Airline Highway in St. Charles Parish, Louisiana. *See* Applicants' Petition for a Writ of Certiorari, App. 24-32. Under Louisiana law, the taking of this property was complete on November 18, 1988, the date the State filed its deposit in accordance with the court's order. La. R.S. 48:455. At the time of the taking, the property was owned by Albertha C. Screen, Alvin J. Caillouet, and Walter S. Rodriguez; subsequently Mrs. Screen acquired Mr. Caillouet's share, after which she died and her share was inherited by Alphonse J. Maranto, such that by the time of trial the sole owners were, and still are, Messrs. Rodriguez and.

After a number of preliminary matters and ownership issues were presented to the trial court, and after choosing to await actual construction of the prior to making any legal demand for compensation in excess of the deposit, the Applicants filed an Answer with specific monetary demands on June 1, 1995. *See* Applicants' Petition for a Writ of Certiorari, App. 18-23. This Answer was interpreted by the state appellate court in this case as the only legal demand which would initiate the accrual of interest under state law, since the applicants made no other legal demand prior to the filing of their Answer. The Answer expressly raised the issue of the constitutionality of the State's interest statute in effect at the taking, although the issue was not pursued at the trial level.

After a week-long jury trial, the Court entered Judgment awarding just compensation to the Landowners of $209,628.50 more than the amount deposited by the State, plus legal interest commencing on the date of the taking, November 18, 1988, reasonable attorney's fees of 25%, and all costs. App. 16-17.

The State appealed several of the trial court's holdings, including the award of legal interest on the grounds that interest should not have been awarded prior to the date that the Applicants filed their Answer, in accordance with the State statute in effect at the time of the taking. On October 28, 1998, a three-Judge panel of the Louisiana Fifth Circuit Court of Appeal modified the trial court's so that interest would commence on the date of Petitioner's Answer, June 1, 1995, rather than on the date of the taking, November 18, 1988, as required by state law. *See* Applicants' Petition for a Writ of Certiorari, App. 2-13. The net effect of the appellate court's ruling on this issue was to reduce the Applicants' award of prejudgment interest by approximately $161,859.41.

On February 26, 1999, the Louisiana Supreme Court denied the Landowners' Writ Application without comment. *See* Applicants' Petition for a Writ of Certiorari, App. 1.

During the pendency of this litigation the Applicants did not appropriately seek, or pursue, the constitutional challenges set forth in their Answer, Appeal, or Writ to the Supreme Court of Louisiana. Furthermore, the Applicants did not raise the constitutional issues it asks this Court to review at anytime prior to their petition to this Court.

SUMMARY OF THE ARGUMENT

The Applicants' writ application urges this Court to review the propriety of a decree from the Supreme Court of Louisiana and to exercise summary, remedial disposition on the merits for what Applicant suggests was palpable federal constitutional error committed by the Supreme Court of Louisiana in the subject decree. The Applicants' writ should be summarily denied by this court, for the application is wanting in five major respects.

First, the Applicants have not properly raised a federal constitutional question regarding the propriety of the "Louisiana statutory framework" *vis-a-vis* the Fifth Amendment to the United States Constitution. While the Applicants alleged in their Answer to the Respondent's petition for expropriation that La. R.S. 48:455 was violative of the state and federal constitutions, the focus of that challenge at the state court level centered around the interpretation and application of the subject statute as defined by state law. As will be addressed more fully in the Respondent's Argument, the Applicants did not place the constitutional issues urged in their Writ Application to this Court before the trial and appellate courts of the State of Louisiana.

Second, because the Applicants failed to appropriately raise the questions presented here before the courts of Louisiana, the record of this case is devoid any pronouncement of the State of Louisiana's interest and purpose for promulgating the subject statute. The Respondent respectfully avers that absent such pronouncement of state interest, this Court is jurisdictionally constrained from applying any appropriate due process analysis under the federal constitution.

Third, the "Louisiana statutory framework" under attack by the Applicants actually affords landowners greater rights and remedies than under the federal constitution. Accordingly, how the State of Louisiana defines such rights, or promulgates when such rights may accrue, is a power reserved to the states under the Tenth Amendment to the United States Constitution. In this case the state courts were merely called upon to define the subject statute and determine whether a subsequent amendment to the subject statute could be applied retroactively.

Fourth, the La. R.S. 48:455 (1988) did provide for prejudgment interest on an excess award in expropriation suits. The question of whether interest is due under La. R.S. 48:455 (1988) is not an issue here. The courts of this state in interpreting La. R.S. 48:455 (1988) have merely held that a landowner's right to prejudgment interest accrues when "legal demand" for excess compensation is made. The "statutory framework" of Louisiana as same existed in 1988 afforded the landowner the right to make such "legal demand" at any time after the suit for expropriation was filed by the state. La. R.S. 48:455. Accordingly, since landowners are afforded the right to assert a legal demand at any time after the filing of suit by the state, the landowner has full control to protect any rights to prejudgment interest by initiating the accrual of same via appropriate legal demand. The "statutory framework" of Louisiana, therefore did not limit the right, or initiation thereof, to prejudgment interest. Rather, this framework defined when such rights accrue. Thus, assuming arguendo this Court feels the issues presented in the Applicants' Writ are ripe for consideration, the "statutory framework" of Louisiana as same existed in 1988 affords requisite procedural and substantive due process required under the federal constitution by giving a landowner the procedural right to make legal demand upon the state to initiate the accrual of interest under La. R.S. 48:455.

Fifth, this exact issue was previously presented to this Court in the matter of *McMillion Dozer Service, Inc. v. State of Louisiana, Department of Transportation and Development*, No. 94-1446 (October Term 1994), in which this Court denied the Applicants' writ.

PREAMBLE

For this Court to fully consider the Respondent's jurisdictional argument, it is necessary to briefly address the evolution of the Applicants' constitutional arguments presented in their Petition for a Writ of Certiorari.

As previously stated the Applicants obtained a judgment from the Twenty Ninth Judicial District Court awarding, *inter alia*, prejudgment interest from the date the state filed its suit for expropriation. (*See* Applicants' Petition for a Writ of Certiorari, App. 16-17). Your Respondent appealed, *inter alia*, that portion of the judgment awarding interest from the date of the State's suit.

The State alleged on appeal that Louisiana Law applicable to the award of pre-judgment interest limited the award of same to the date ~~on which~~ the landowner makes a legal demand for additional compensation. The State argued that the statute providing interest on such judgments in "quick taking" expropriation cases (La. R.S. 48:455) mandates such a result. The crux of the State's argument (as well as the Applicants' constitutional assertions) centered around the interpretation of the term "legal demand", as well as the issue whether a subsequent amendment to that statute could be applied retroactively.

The Applicants argued in opposition on appeal that the term "legal demand" means the date on which the State takes title to the landowner's property. The constitutional angle of the argument centered around the interpretation of the 1988 statute.[1] The Applicants argued that the Court of Appeal was required by the State Constitution to interpret the term "legal demand" as the date on which the State takes title. The Court of Appeal simply did not agree with that assertion.

Alternatively, the Applicants argued that the Louisiana Legislature cured the alleged constitutional deficiencies in the 1988 statute by amending and re-enacting La. R.S. 48:455 in 1992 to call for interest on judgments in "quick taking" expropriation cases from the date of the Petition for Expropriation. The constitutional angle of this argument centered around the issue whether the 1988 or 1992 version of La. R.S. 48:455 was controlling to the pending suit. Which statute was controlling to the instant case was wholly dependent upon the court's interpretation whether the 1992 statute was remedial or substantive in nature. If remedial the statute could be applied retroactively. If substantive, the Court was constrained by state constitutional precepts to apply the 1992 statute prospective. Be that as it may, the constitutional question raised by the Applicants in state court was merely of interpretation and application of the subject statutes, whether such interpretation was one of definition of the 1988 statute, or prospective versus retroactive application of the 1992 statute.[2]

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1. It is worthy to note that the Applicant's constitutional attack at the state court level was not one of substantive due process on federal constitutional grounds

2. The applicants have abandoned the assertion that the erroneous interpretation and application of La. R.S. 48:455 is

(Cont'd)

The Fifth Circuit Court of Appeal agreed with the State's arguments and reversed the Trial Court's award of interest from the date of the expropriation suit and rendered judgment awarding interest from the date of the Applicants' legal demand, which was interpreted to mean when the landowner filed their answer, since no other "legal demand" appeared in the record.

The Applicants then applied for a Writ of Certiorari to the Supreme Court of Louisiana in which they adopted the same argument forwarded at the Court of Appeal. In adopting the same argument forwarded at the Court of Appeal, the Applicants essentially requested the Supreme Court to consider only whether the Fifth Circuit's interpretation and application of a Louisiana Statute (La. R.S. 48:455) was constitutionally permissible under the State Constitution. The Applicants merely paid lip service to federal constitutional principals of due process, without asserting any of the essential procedural or substantive components predicate to such an inquiry. The Supreme Court of Louisiana denied the landowners' writ. (*See* Applicants' Petition for a Writ of Certiorari, App. 1).

Thus, the Applicants' assertions to this Court that the "Louisiana statutory scheme in expropriation cases" violates federal constitutional law was never appropriately raised in the Louisiana state courts. Therefore, nothing can be read into the Supreme Court's decree that the alleged appropriate federal constitutional questions were ever considered by the Fifth Circuit or the State Supreme Court.

(Cont'd)
unconstitutional, since that holding is a matter of State law. The applicants only now urge that controlling precedent of this Court mandates that the 1988 version of section 455 must be stricken on federal due process grounds.

In any such due process claim, it is necessary for this Court to be able to determine from the record that appropriate federal constitutional questions were properly raised and considered by the State Supreme Court, before this Court finds jurisdictional bases to grant any relief prayed for in the Applicants' Writ to this Court. Therefore, if the essential ingredients to an appropriate due process analysis (at least on a federal constitutional question) are absent from the record in this proceeding, this Court should find that there are insufficient jurisdictional grounds to grant the Applicants the relief prayed for.

REASONS FOR DENYING THE WRIT

I.

DOES THE APPLICANTS' PETITION FOR A WRIT OF CERTIORARI LACK JURISDICTIONAL AND PROCEDURAL REQUISITES FOR THIS COURT'S REVIEW?

Any time a litigant challenges the constitutionality of a state statute, either as written or as applied, this Court must first determine whether it will exercise its discretionary jurisdiction to hear such a matter. One of the essential ingredients in such a jurisdictional determination is whether a constitutional issue has been properly and timely asserted. Such a determination is most critical in due process cases, since state action against or in favor of a certain class of individuals must necessarily be weighed against the state's interest in doing so under its police powers and rights reserved under the Tenth Amendment to the United States Constitution. In most cases in which the constitutionality of a state action is based upon due process grounds, it should

be a necessary jurisdictional predicate for this Court to determine whether the state was afforded an opportunity to weigh the effects of its own legislation against state (and perhaps federal) constitutional precepts. In the instant case the State was afforded no such opportunity. Therefore, any discussion in this brief on the legitimacy of state interest in promulgating La. R.S. 48:455 (1988) cannot be viewed with certainty as to legislative intent and purpose. However, the State contends that such an analysis is not necessary, for neither La. R.S 48:455 (1988) nor the Louisiana statutory scheme violates due process for the reasons set forth in other sections of this brief.

How the Supreme Court of Louisiana dealt with the constitutional issues asserted in the lower courts in this case (from a jurisdictional perspective) is important to how this Court should view the Supreme Court's decree with regard to that court's choice to decline to hear the Applicants constitutional challenges to the subject laws. Under Louisiana law to hold legislation invalid under the State Constitution, it is necessary for the complaining party to rely on some particular constitutional provision that limits the power of the legislature to enact the subject statute. LSA Const. Art. 2, § 1 and 2; LSA Const. Art. 3, § 1. The Supreme Court of Louisiana will refuse to hear constitutional challenges that are not "in the proper posture for [the] court's review". *Vallo v. Gayle Oil Co., et al.*, 94-1238 La. 11/30/94, 646 So. 2d (La. 1994) at 865. In considering whether a constitutional challenge is "in the proper posture", our Supreme Court strongly considers (under its discretionary jurisdictional authority) whether such an issue was raised appropriately at the trial level. Our Supreme also weighs the exercise of such discretionary jurisdiction over constitutional issues against the real potential of depriving the individual

of due process, should a case be refused to be heard on procedural grounds.

In determining whether our Supreme Court would deny to hear constitutional claims that are not appropriately raised in the lower courts, our Supreme Court reserves the right to decline to hear such cases on jurisdictional grounds for a number of well established reasons. Among such reasons are an individual's failure to appropriately raise and pursue constitutional challenges of state law within an appropriate pleading. Additionally, when an individual fails to pursue a hearing on the constitutionality of a given state statute, the court heavily considers that the record, therefore, is incomplete to make an appropriate determination of constitutionality.

Also, our Supreme Court may refuse to entertain any constitutional challenge that is forwarded on appeal at the state level where the Attorney General of the State is not notified of such a challenge at the trial level. Although our Supreme Court does not consider such notification an indispensable part of a constitutional challenge, the Court, nevertheless, reserves the discretionary jurisdictional authority to refuse any constitutional challenge lacking such notice. Likewise, our Supreme Court may refuse to entertain any constitutional challenge where such a challenge is not forwarded at the trial level, since such a constitutional challenge would be appropriately made part of a hearing on such issues. The reason for this declinatory action, as explained by our Supreme Court, is based upon certain procedural requirements that insure that the proper disposition of an allegedly constitutionally infirm statute is preserved in the record of a given case.

In *Vallo, supra*, our Supreme Court declined to consider the constitutional challenge to a particular State statute for several reasons akin to the instant case. First, the Court noted that the plea of unconstitutionality was first raised in a memorandum rather than a pleading.[3] Second, the Court noted that Vallo did not serve the Attorney General of the State of Louisiana, or notify him of the challenge to the constitutionality of the subject statute so that the Attorney General could elect whether to exercise his statutory right to represent the state's interests in the proceedings pursuant to La. R.S. 49:2579(B). Third, the Court noted that the state was not afforded sufficient time to defend the constitutionality of the statute. Finally, (and perhaps most importantly to the instant) there was no hearing had in which the constitutionality of the statute was contested.[4]

Based on these principles the *Vallo* court concluded that in absence of the exercise of appropriate procedural invocation of the challenge of unconstitutionality, the record of the proceedings is devoid of any indication that the party attacking the statute sustained his or her burden of proof regarding same. Furthermore, the record is devoid any proof whether the trial court was afforded the opportunity to construe the statute so as to preserve its constitutionality as mandated by state law. This latter conclusion bears heavily on the Supreme Court's decree in the instant case, for the Applicants in this case failed to satisfy the procedural requirements set forth above.

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3. The result of this procedural failure was that no hearing was held at the lower court levels on the issue of constitutionality.

4. This final note relates back to the procedural failure of Vallo to assert the constitutionality of the subject statute in an appropriate pleading.

Additionally, with respect to this Court's determination of the jurisdictional issues asserted herein, the Applicants in this case for the first time alleges that "Louisiana statutory scheme" violates due process under the federal constitution in its Writ to this Court. In determining whether the state court's decree is appropriate, as well as to determine whether this Court should exercise discretionary jurisdiction to hear this case, this Court must be aware that no hearing was held at the trial level on the constitutional issues asserted either in the Applicants' Writ to the Louisiana Supreme Court, or this Court. The State, therefore, was not given an appropriate opportunity to defend the constitutionality of the statute at the trial level. Consequently, there was no pronouncement of legitimate state interest in the record of these proceedings upon which the trial court (even appellate courts) could analyze the state's interests, *vis-a-vis*, due process constraints.

Furthermore, this Court should be aware that the Applicants' new assertion that the "Louisiana statutory scheme" deprives the landowners of full compensation under the Fifth Amendment to the United States Constitution is now based upon the assertion that their claim is supported by "controlling precedent" of this Court. These new assertions made under the guise of due process are exactly the type of constitutional challenges our Supreme Court refuses to entertain on discretionary jurisdictional grounds, citing the same reasons that the record is devoid any pronouncement of the legitimacy of the state's interest with respect to both state and federal tests under due process analysis. *Vallo, supra.*

While the Applicants in this case did aver the unconstitutionality of 48:455 in their Answer, they failed to

pursue this constitutional challenge in any matter which would satisfy our Supreme Court under the *Vallo* rationale. While the Supreme Court of Louisiana's decree denying the Applicants' Writ Application to that court is silent as to the reasons for the denial, the court was within its authority to refuse to hear the Applicants' case.[5]

As in any due process claim, any person challenging the constitutionality of a written law, or the application thereof, should at least pursue such a claim in the lower courts, prior to requesting summary action of this Court on grounds newly asserted. As this Court has previously held:

> [This] court must be able to see clearly, from the whole record, that a certain provision of the constitution was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. . . . [O]ur jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the constitution . . . has been denied by the judgment sought to be reviewed, it must appear form the record of the case either the right so set up and claimed was expressly denied, or that such was the necessary effect in law of the judgment.

Chicago, B. & .R. Co. v. City of Chicago, 166 U.S. 266 (1897) at 232 (emphasis added).

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5. Perhaps the decree of our Supreme Court was not so much based upon due process as it was the *Vallo* rationale, perhaps not. However, we do not know the bases upon which our Supreme Court refused to hear the subject constitutional challenge, for it was not appropriately raised, and "not in a posture for review".

While it is not the intention of this Court to decline to hear all constitutional arguments for want of procedural correctness on the premise cited above, the Court should address in each such case whether want of procedural correctness warrants the Court's exercise of jurisdictional discretion. This is especially true in this case where the Applicants, by their own artifice, failed to preserve a record worthy of appropriate due process analysis.

Most importantly, the Applicants' failure to preserve a substantive due process right and claim results not from any action or inaction of the State, but rather from the Applicants' failure to exercise procedural due process rights which were available to them in the courts of Louisiana. Indeed, the Applicants' failure in this regard serves only to insure that this Court has no record on which to measure any substantive due process infringement resulting from the Supreme Court of Louisiana's decree in this case.

Lastly, aside from the procedural deficiencies noted above, this Court can decline to hear this matter, for it fails to raise any appropriate federal question. As will be more fully addressed below, neither La. R.S. 48:455, nor the "Louisiana statutory scheme" violates principles of due process under the Fifth Amendment of the United States Constitution.

II.

WAS LA. R.S. 48:455 (1988) VIOLATIVE OF THE FIFTH AMENDMENT?

To determine whether the statute in question violates federal precepts of due process, it is necessary for this Court (should it decide to hear this case) to determine whether the Applicants were deprived any due process right by either the promulgation or application of this law. The Applicants assert that the subject statute deprives them of interest from the date of the taking, and that the Fifth Amendment, as interpreted in previous cases by this Court, mandates the Applicants' entitlement thereto from the date of the taking. However, the subject statute as written and as applied in this case does nothing to deprive the Applicants of any right to such interest from the date of the taking.

This Court should note that the subject statute did provide for pre-judgment interest on any excess award in expropriation suits brought under Title 48 of the Louisiana Revised Statutes. The question of whether interest is due under the subject statute is not at issue here. The statute only defined when such interest began to toll, and placed the assertion of that right in the hands of the party claiming it. The question before this Court then is; what particular action of the State served to deprive the Applicants of any procedural or substantive due process rights guaranteed under the Fifth Amendment of the United States Constitution when the loss of any part of such right results from the individuals failure to assert the right?

Since the subject statute appropriately provides for pre-judgment interest on any excess award in expropriation suits

brought under Title 48 of the Louisiana Revised Statutes, the courts of this state in interpreting that statute have merely held that a landowner's right to pre-judgment interest accrues when legal demand for excess compensation is made. The subject statute as it existed in 1988 afforded a landowner the procedural and substantive right to make legal demand at any time after the suit for expropriation was filed by the State. La. R.S. 48:455. Accordingly, since any landowner at this time was afforded the right to assert a legal demand at any time after the filing of the suit by the State, the landowner was afforded full control to protect any rights to pre-judgment interest by initiating the accrual of same via legal demand.

The Applicants craftily suggest to this Court that the subject statute requires a landowner to make legal demand upon the State only by filing an Answer to the expropriation suit. However, nothing in the subject statute, nor in the Louisiana Code of Civil Procedure, limits the manner in which such a legal demand can be made. Since the Louisiana Legislature used the term "legal demand" as opposed "judicial demand", it remains the perview of the courts of Louisiana to interpret the meaning of the term "legal demand" as provided in the subject statute.[6] In that regard there were many other methods available to a landowner to assert legal demand for excess compensation other than filing an Answer to the suit. Since the Applicants had every procedural opportunity to assert an appropriate legal demand at any time after the filing of the expropriation suit in this case, the Applicants were given sufficient procedural rights to preserve any substantive rights of due process in this case. If the Applicants failed to do so appropriately, either by their

6. Under Louisiana law a judicial demand is an affirmative pleading; such as a petition (complaint) or a reconventional demand (counter-claim).

own negligence or artifice, it cannot be said that the ultimate limitations on the accrual of interest in this case resulted from any State action.

Therefore, the State of Louisiana did not in any way prohibit the Applicants in this case from asserting a legal demand for excess compensation at any time after the subject suit for expropriation was filed. Since the Applicants were not deprived of the procedural right to assert a substantive claim, and since their substantive rights accrue immediately upon the assertion of that claim whenever made, the "statutory framework" satisfies fundamental federal precepts of both procedural and substantive due process under the Fifth Amendment.

III.

WAS THE LOUISIANA STATUTORY FRAMEWORK VIOLATIVE OF THE FIFTH AMENDMENT?

As has been argued previously before this Court,[7] the "Louisiana statutory framework" under attack by the Applicants herein actually affords landowners greater rights and remedies than under the federal constitution. Accordingly, how the State of Louisiana defines such rights, or promulgates when such rights may accrue, is a power reserved to the states under the Tenth Amendment of the United States Constitution. In this case the State action complained of was merely an interpretation under State constitutional law how the provisions of Title 48 should be applied to this case, and how the appellate courts of this should define what constitutes "legal demand" under the facts of this case.

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7. *McMillion Dozer Service, Inc. v. State of Louisiana, Department of Transportation and Development*, No. 94-1446 (October Term 1994).

In their Writ Application to this Court the Applicants argue that the "Louisiana statutory scheme" works to deprive Applicants of their rights under the federal constitution and the cases cited therein. The scheme noted by the Applicants consists of three (3) statutes in particular, which they allege taken together is violative of the constitution. Although this assertion was not specifically addressed in the lower courts of this State, it nonetheless lacks merit and should not be considered by this Court.

Particularly, the Applicants take issue with La. R.S. 48:451, which provides that as soon as an Answer is filed, "either party may, upon ex parte motion, request that the matter be docketed for trial not more than sixty (60) days after the filing of the motion, and that the trial shall be conducted with preference and the greatest possible dispatch". The Applicants artfully assert that this statute presents the tactical litigation dilemma of either immediately filing an Answer to preserve substantive rights to the accrual of interest, or waiting until a landowner can appropriately prepare its case for trial. The Applicants suggest that any landowner would opt to take as much time as necessary to prepare its case for trial and only then file its Answer and proceed to trial within sixty (60) days as provided in La. R.S. 48:451.

However, the Applicants fail to tell this Court that the subject laws as promolgated and applied in this suit did not deprive the Applicants of making "legal demand" for additional compensation immediately after the expropriation suit was filed. The Applicants would lead this Court to believe that the only procedural manner available under Louisiana law in which such a right could be asserted is the filing of an Answer, which is simply not true.

Curiously enough, the Applicants previously argued before the Fifth Circuit Court of Appeal of the State of Louisiana that the term "legal demand" meant something other than an Answer. They argued that certain procedural matters previously addressed by the trial court prior to the filing of the Applicants' Answer in this suit constituted legal demand under La. R.S. 48:455 to initiate the accrual of interest. The Applicants *then* recognized that there were other appropriate procedural methods available to the them to assert their legal demand to initiate the accrual of interest other than the filing of an answer. In assessing the Applicants' assertions in the state appeal the Fifth Circuit Court of Appeal of Louisiana held that the procedural actions of the Applicants in this case, prior to the filing of their Answer, did not constitute "legal demand" within the meaning of the subject statute. The Court did not say that legal demand could only be made by Answer to the suit, but rather, that the Applicants' Answer was the only legal demand that they had asserted in this action.

As the Applicants urged to Fifth Circuit Court of Appeal of Louisiana, and as that court recognized, nothing in the "Louisiana statutory scheme", nor in the Louisiana Code of Civil Procedure, prohibits a landowner from making legal demand in any manner deemed satisfactory to the courts of this state. Indeed, the Applicants in this case could have forwarded legal demand by so asserting at the time the deposit of funds were withdrawn from the registry of the court, reserving the right to file an answer at a time they deemed more tactically appropriate. Be that as it may, the courts of this state in this case appropriately held that the Applicants had not made any legal demand upon the State of Louisiana to initiate the accrual of interest within the meaning of La. R.S. 48:455. Accordingly, the Applicants

have not demonstrated any denial of procedural or substantive due process, since they were not prohibited by state law to assert a legal demand upon the State to initiate the accrual of interest at any time after the suit was filed in this case.

IV.

DOES THE STATE OF LOUISIANA HAVE AUTHORITY PURSUANT TO THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO DEFINE WHEN CERTAIN SUBSTANTIVE RIGHTS ACCRUE PURSUANT TO TITLE 48 OF THE LOUISIANA REVISED STATUTES?

The State of Louisiana has a definite compelling interest procuring land upon which projects may be developed for benefit of the good of the citizens of this State. Consonant with this interest the State of Louisiana has promolgated a statutory framework that actually affords landowners greater rights and remedies than are provided under the federal constitution. Louisiana state law recognizes elements of compensable damages not recognized under federal law. Such damages include delay damages, which can be awarded to the landowner upon a showing that any undue delay in the taking of property, or undue delay in completing the project for which the property is taken, affects the use of any remaining property. Federal law does not recognize any such rights.

In this case the landowners sought (as was their right) hundreds of thousands of dollars in delay damages. Accordingly, the Applicants were entitled under Louisiana law to recover damages in excess of what is minimally required under the federal constitution. Since Louisiana affords landowners greater rights than required under the federal constitution, how the State

of Louisiana defines such rights, or promulgates when such rights may accrue, is a power reserved to the states under the Tenth Amendment to the United States Constitution.

Consistent with the rights reserved to it by the Tenth Amendment to the United States Constitution, the State of Louisiana has the power to define when certain substantive rights may accrue, especially since the Louisiana statutory framework under attack here does not prohibit the manner nor the timing in which a landowner can assert its substantive rights. Under the Louisiana statutory framework under attack here by the Applicants, landowners possess the substantive due process rights to assert legal demand for compensation, severance damages, delay damages, and pre-judgment interest from the time such claim is asserted within the meaning of La. R.S. 48:455. The 1988 law under attack did not deprive the landowners pre-judgment interest, rather it merely defined when that right accrues. If a landowner chose to make a legal demand immediately upon the State obtaining a judgment of expropriation, his exercise of this procedural right would cause all substantive rights guaranteed under the State constitution to accrue henceforth. Federal law in such instances only requires that a state refrain from actions that would deprive an individual of asserting substantive rights of due process. It does not require the State to protect an individual from his own artifice. Thus, the "Louisiana statutory scheme" entitling a landowner to pre-judgment interest upon legal demand does not deprive any substantive rights, since the right to such interest accrues immediately upon such legal demand. Clearly, then, there is a legitimate State interest in defining when such substantive rights to interest accrue, especially when the timing of the assertion of such rights is within the discretion of the individual not the State.

CONCLUSION

Although the Applicants aver that the jurisdiction of this Court is invoked under 28 U.S.C. § 1257, this Court should decline to grant writs for the Applicants' failure to put their constitutional claims in an appropriate posture for review. Also, this Court should not exercise jurisdiction under § 1257, for the resolution of the issues presented by the Applicants is reserved to the State of Louisiana pursuant to the Tenth Amendment to the United States Constitution.

Furthermore, even if this Court deems that the Applicants' Writ satisfies jurisdictional requirements for review, the Applicants' Writ should be denied on substantive grounds as well. Since landowners in this state, at all times pertinent hereto, were ensured the procedural right to forward substantive claims at any time after the filing of suit for expropriation by the state (including the making of a legal demand to initiate the toll of prejudgment interest), the "Louisiana statutory scheme" under attack by the Applicants satisfies due process requirements under the federal constitution. The Applicants' therefore have failed to show that an action, law, or application of law of the state served to deprive they of any procedural or substantive rights under the federal constitution.

Respectfully submitted,

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